



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1156/2022

In the matter between:

CIBA PACKAGING (PTY) LTD T/A CIBAPAC

APPELLANT

and

TIMELINK CARGO (PTY) LTD

RESPONDENT

Neutral citation: *Ciba Packaging (Pty) Ltd t/a Cibapac v Timelink Cargo (Pty) Ltd* (1156/2022) [2023] ZASCA 161 (28 November 2023)

Coram: MAKGOKA, HUGHES and MABINDLA-BOQWANA JJA and
BINNS-WARD and TOKOTA AJJA

Heard: 7 November 2023

Delivered: 28 November 2023

Summary: Civil procedure – appealability of dismissal of an exception –
restatement of principles.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Matojane J, sitting as court of first instance):

The appeal is struck from the roll, with costs.

JUDGMENT

Mabindla-Boqwana JA (Makgoka and Hughes JJA and Binns-Ward and Tokota AJJA concurring):

[1] The appeal concerns the much debated and recurring question of the appealability of a court order. The Gauteng Division of the High Court, Johannesburg (the high court) dismissed an exception raised by the appellant, Ciba Packaging (Pty) Ltd t/a Cibapac (Cibapac), to the particulars of claim of the respondent, Timelink Cargo (Pty) Ltd (Timelink). The appeal is with the leave of the high court.

[2] Timelink instituted an action against Cibapac, in the high court. It alleged in its particulars of claim that during December 2011, it concluded an agreement with Cibapac. In terms of the agreement, it would supply freight services for Cibapac within three days of receipt of written purchase orders from Cibapac. The services would be rendered at Timelink's usual rate, alternatively at the reasonable rate

determined according to the industry standard. In addition, Cibapac would be liable for all necessary disbursements incurred in the rendering of services on its behalf.

[3] Timelink further alleged that during December 2019 to March 2020, it rendered the services in terms of the agreement, as a result of which it became entitled to receive payment in the sum of R1 652 678.80. On 3 April 2020, it sent a letter of demand to the Cibapac claiming payment of the alleged debt.

[4] In addition, it made the following allegations: (a) on 14 May 2020, Cibapac was placed under business rescue; (b) Cibapac admitted its indebtedness to it and recorded it as a creditor in its business rescue plan; (c) the business rescue plan was adopted in September 2020; and (d) the business rescue plan terminated on 18 December 2020 after the business rescue practitioner filed a notice of substantial implementation. Timelink pleaded that it did not participate in the business rescue proceedings.

[5] Cibapac filed an exception to Timelink's particulars of claim on the grounds that the particulars of claim did not disclose a cause of action. This, Cibapac alleged, was because Timelink's claim was barred by the provisions of s 154(2) of the Companies Act 71 of 2008 (the Act), which reads as follows:

‘(1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.

(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.’

[6] The thrust of Cibapac's exception was therefore this. Timelink was seeking to enforce a debt allegedly owed by Cibapac immediately before the beginning of the business rescue process. Since Timelink did not plead that the business rescue plan allowed for the enforcement of its alleged debt, its particulars of claim did not disclose a cause of action.

[7] The high court dismissed the exception with costs. Relying on this Court's interpretation of s 154(2) in *Van Zyl v Auto Commodities (Pty) Ltd*,¹ it reasoned as follows:

‘... the approval and implementation of the business rescue plan do not necessarily discharge the debt. It cannot be said that the pleadings are excipiable on every interpretation that can reasonably be attached to it.

On a reading of the particulars of claim, the claim in respect of the breach of oral contract has been set out to enable the excipient to respond to it. I find that the plaintiff's cause of action is not dependent on the allegations relating to business rescue proceedings pleaded in paragraph 10 of the particulars of claim. I, therefore, find that the excipient can respond to the claim for breach of the oral agreement, and it follows that the exception must fail.’

[8] The issue in the appeal is whether the high court's order dismissing the exception is appealable; and, if so, whether Timelink's particulars of claim are excipiable on the basis that they do not disclose a cause of action.

[9] The general principle is that the dismissal of an exception is not appealable, save where the exception challenges the jurisdiction of the court.² This Court, in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and*

¹ *Van Zyl v Auto Commodities (Pty) Ltd* [2021] ZASCA 67; 2021 (5) SA 171 (SCA); [2021] 3 All SA 395 (SCA).

² *Maize Board v Tiger Oats Limited and Others* [2002] 3 All SA 593 (A); 2002 (5) SA 365 (SCA) para 14.

Others, recently confirmed this.³ One of the exceptions raised in *TWK* was that the plaintiff had no cause of action to secure an appraisal remedy in terms of s 164 read with s 37(8) of the Act, unless the company had more than one class of shares. That was an alleged statutory prerequisite, which was, at best for the defendant, found to be no more than a question of law.

[10] Cibapac accepted the position as set out in *TWK*. It sought to distinguish its case on the basis that its exception went to the competence or the jurisdiction of the high court to determine the matter before it, and as such is appealable because it fell within the exception to the rule in respect of the non-appealability of orders dismissing exceptions recognised in *TWK*.⁴ Counsel for Cibapac argued that it is not competent for the court to entertain a claim, such as the one advanced by Timelink in its summons, because, so he submitted, the claim is expressly prohibited by s 154(2) of the Act.

[11] As to the exception itself, counsel submitted that the cause of action as pleaded by Timelink could not be divorced from the allegations relating to the placing of Cibapac in business rescue and the existence and termination of the business rescue plan. Because of these allegations, so it was contended, Timelink had the onus to plead why the prohibition in s 154(2) of the Act was not applicable.

³ *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA) paras 9 and 43.

⁴ *TWK* paras 10 and 43.

[12] The submission in relation to the appealability issue is unsustainable for reasons explained in *TWK* as follows:⁵

‘*Maize Board* does recognise a carve-out to the rule that the dismissal of an exception is not appealable. An order dismissing an exception will be appealable where the exception challenges the jurisdiction of the court. *That is so for reasons that were explained in Moch*. Where the challenge concerns the jurisdiction of a court, and hence the competence of a judge to hear the matter, the decision of the court is considered definitive, and appealable. This is consistent with the principles enunciated in *Zweni* because the decision as to jurisdiction is considered final. *This position is entirely justified because an error as to jurisdiction, if not subject to appellate correction, would permit the court below to proceed with a matter when it had no competence to do so, rendering what it did a nullity. That is plainly an undesirable outcome. Furthermore, a challenge to jurisdiction is taken at the commencement of proceedings. Until this challenge is finally resolved, a court should not exercise coercive powers that compel compliance.*’ (My emphasis.)

[13] Counsel for Cibapac submitted that Cibapac’s exception is similar to the situation in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*,⁶ which had to do with the appealability of an order dismissing an application for recusal. This is not so. In *Moch*, the Court underscored that:

‘A decision dismissing an application for recusal relates, as we have seen, to the competence of the presiding judge; it goes to the core of the proceedings and, if incorrectly made, *vitiates them entirely*. . . That a decision dismissing an application for recusal has such a bearing stands to reason because it reflects on the competence of the presiding judge to define the parties’ rights and *to grant or refuse the relief claimed*. For this very reason it is *comparable with a decision on a plea to a court’s jurisdiction* . . .’⁷ (My emphasis.)

⁵ *TWK* para 43, referring to *Maize Board v Tiger Oats Limited and Others* [2002] 3 All SA 593 (A); 2002 (5) SA 365 (SCA); *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) and *Zweni v Minister of Law and Order* [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A).

⁶ *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A).

⁷ *Moch* at 10D-G.

[14] The objective of limiting the appeal of a dismissal of an exception to challenges of jurisdiction, is evident from these cases. Proceeding with a matter in circumstances where a judicial officer is not competent to grant or refuse the relief sought, goes to the heart of the proceedings. An order issued by a court that lacks jurisdiction will vitiate the entire proceedings and it is final. An error committed in those circumstances cannot be corrected or revisited by that court at a later stage.

[15] That is, however, not what we are dealing with in the present matter. Here, the high court has jurisdiction to determine the action brought by Timelink. It may grant or refuse the claim. It may base its refusal of the claim on the legal challenge posed by s 154(2) of the Act or on other bases. Thus, any view taken by the high court when dismissing the exception is capable of being altered by the court deciding the matter on trial. That order will be competent. In *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)*,⁸ this Court had this to say:

‘ . . . one would say that an order dismissing an exception is not the final word in the suit on that point that it may always be repaired at the final stage. All the Court does is to refuse to set aside the declaration; the case proceeds; there is nothing to prevent the same law points being re-argued at the trial; and though the Court is hardly likely to change its mind there is no legal obstacle to its doing so upon a consideration of fresh argument and further authority.’

[16] Counsel further placed reliance on the minority judgment of the Constitutional Court in *Baliso v Firstrand Bank Limited t/a Wesbank*,⁹ which he contended characterised non-compliance with a provision of a statute as a matter going to the

⁸ *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 at 601.

⁹ *Baliso v Firstrand Bank Limited t/a Wesbank* [2016] ZACC 23; 2016 (10) BCLR 1253 (CC); 2017 (1) SA 292 (CC).

competence of the court and hence its jurisdiction. This, he submitted, the majority judgment did not disagree with.

[17] The exception in *Baliso* concerned non-compliance with the notice required under s 127(2) of the National Credit Act 34 of 2005 (the NCA). Section 130(3)(a) of the NCA permits a court to determine a matter in respect of a credit agreement, only after procedures required by ss 127, 129 or 131 have been complied with, where those sections apply.

[18] The majority judgment observed that regardless of the outcome of the exception, the applicant was in a position to provide evidence at the trial that he was not given proper notice in terms of s 127(2) of the NCA. ‘After hearing evidence from both parties, the presiding judicial officer would then have to assess this evidence in order to decide whether proper notice was given’.¹⁰ It further found that the dismissal of the exception was not final in its effect, neither was it definitive of the rights of the parties, nor dispositive of any substantial portion of the relief sought in the main proceedings, as required in *Zweni*.¹¹ The appealability test was, therefore, not met.¹²

[19] The minority, however, adopted a different view. It held that the decision sought to be appealed against related to the jurisdiction or competence of the high court to determine the matter before it did, and, as such, the decision (of the high court) was appealable. It further held that s 130(3) of the NCA introduced a

¹⁰ *Baliso* para 19.

¹¹ *Zweni v Minister of Law and Order* [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A).

¹² *Baliso* para 20.

precondition that must exist before the court may have the competence or jurisdiction to determine the matter.

[20] One of the relevant passages referred to in *Baliso* reads as follows:

‘This Court made it clear that section 191(5) concerns jurisdiction. Given the use of “if” and “may” in section 191(5), and “may” and “only if” in section 130(3) of the Act, it seems to me that section 130(3) relates to the competence or jurisdiction of the court. Its effect is that, the court will have no jurisdiction in respect of a matter where the procedures prescribed by section 127(2) have not been complied with. *Therefore, compliance with the procedure in section 127(2) goes to the competence or jurisdiction of the court. A decision that there has been compliance with section 127(2) is a decision on the competence or jurisdiction of the court. Once a court of first instance has made a decision on jurisdiction, it cannot alter that decision later.*’¹³ (My emphasis.)

[21] The majority had recognised that compliance with the relevant sections of the NCA is a prerequisite for determining the matter. Nevertheless, it concluded that the question of whether proper notice was given would be assessed when evidence was presented in the trial.¹⁴

[22] Even if the approach adopted by the minority were to be accepted, it is not supportive of Cibapac’s contention. There is no precondition required to be fulfilled in the current matter before the high court could determine the matter. It has jurisdiction. *Baliso* dealt with a completely different set of circumstances and is clearly distinguishable from the present case. The minority, in any event, characterised the court’s decision on the dismissal of the exception as one that could not be altered later.¹⁵

¹³ *Baliso* para 68.

¹⁴ *Baliso* para 19.

¹⁵ *Baliso* para 68.

[23] As in *TWK*, the dismissal of the exception in this case has nothing to do with jurisdiction. At best, it turns on the question of law ‘that [has] nothing to do with the competence of the trial court to try the action. Rather, the trial court can consider again whether the dismissal of the exception was correct’.¹⁶

[24] Evidence may be required in relation to what is provided for in the business rescue plan in relation to Timelink’s claim, taking into account the provisions of s 154(2) of the Act. Facts surrounding its alleged non-participation in the business rescue proceedings may, among other issues, also be relevant. All these matters should be decided with finality at the trial. Given the findings on appealability, it is not necessary to decide whether the exception is good in law or not.

[25] In the end, counsel for Cibapac submitted that Cibapac is not seeking the dismissal of the action, but for Timelink to be afforded an opportunity to amend its particulars of claim. This is a further indication that the dismissal of the exception did not finally dispose of the issue between the parties and confirms the fact that the high court has jurisdiction over the matter.

[26] In light of the order of the high court not meeting the requirements of appealability, the appeal must be struck from the roll, with costs following the result.

[27] The following order is made:

The appeal is struck from the roll, with costs.

¹⁶ *TWK* para 44.

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

Appearances

For the appellant: L E Combrink SC with W J Pietersen

Instructed by: Venns Attorneys, Pietermaritzburg
Honey Attorneys, Bloemfontein

For the respondent: K Gounden

Instructed by: Larson Falconer Hassan Parsee Inc, Durban
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